APPENDIX A

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 87-6643-CIV

BANKATLANTIC, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,
Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER, INC.,
Defendant.

July 10, 1989

Eugene Stearns, Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A., Miami, Fla., for plaintiff.

Arthur England, Schwartz, Nash, Block & England, Fine Jacobson, Miami, Fla., for defendant.

MEMORANDUM ORDER

SCOTT, District Judge.

The complaint in this action raises serious issues about the duties of a financial advisor to a federal savings and loan association. Even for a commercial dispute, the stakes are high—twenty-nine million dollars.[1] Plaintiff, BankAtlantic, claims that Defendant, PaineWebber, Inc.,[2]

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[1] Plaintiff also seeks punitive damages.

[2] Blyth Eastman Paine Webber, Inc., n/k/a PaineWebber, Inc.

has attempted to reduce the risk of loss on the merits by concealing damaging evidence in defiance of a prior Order. Plaintiff has moved to strike Defendant's pleadings and enter a default. Defendant denies any wrongdoing.

The Court is therefore faced with a delicate task. Our mission is to preserve the integrity of the discovery process while protecting Defendant's right to a full and fair trial on the merits. These important values sometimes conflict. When presented with such a case, the Court must balance the competing interests to reach a fair result.

The Court fully appreciates the personal, professional and financial interests affected by this motion. For that reason, we have been careful to afford both sides great latitude in their presentation of the issues, and we have given serious consideration to the product of their efforts. The parties have fully briefed the issues raised. The Court conducted a preliminary and full evidentiary hearing, where the parties questioned witnesses and introduced evidence over a period of three days. The transcript itself is over six hundred pages.

In addition, the Court has reviewed in detail all documents produced by Defendant in response to the Order to Show Cause issued after the preliminary hearing. Moreover, we have respected Defendant's assertion of various privileges pending in camera review. We have taken judicial notice of the entire record for the purpose of this motion. In sum, the parties have been given every possible opportunity to enlighten the Court on the facts and applicable law. After serious deliberation, we now render our decision.

I. BACKGROUND

The Court will briefly review the history of this case to provide a sense of perspective. Thus, before assessing Plaintiff's motion, we first discuss the underlying dispute and the ensuing discovery battle.

A. *Factual Allegations*

This litigation arises out of the triangular relationship between Plaintiff BankAtlantic, Defendant PaineWebber, Inc., and Homestead Savings ("Homestead"). Plaintiff is a federal savings and loan association. Plaintiff alleges that it retained Defendant as a financial advisor pursuant to an Engagement Letter executed on March 20, 1984. According to Plaintiff, Defendant suggested that Plaintiff agree to make certain investments known as interest rate swaps with Homestead to provide a beneficial hedge against interest rate risk.

Simply put, Plaintiff would swap some of its variable-rate interest obligations for Homestead's fixed-rate interest obligations. While the parties would not actually transfer their principal obligations, they would agree to compensate each other as interest rates fluctuated. Thus, if interest rates rose above the fixed rate, Homestead would pay Plaintiff the difference between the amount due on the variable rate obligations and the amount due on the fixed rate obligations. Similarly, if interest rates fell, Plaintiff would pay Homestead the difference.

Plaintiff claims that in reliance on Defendant's advice, it agreed to two interest rate swaps with Homestead on March 23 and August 3, 1984, in the principal amounts of thirty-five and fifty million dollars, respectively. According to Plaintiff, the match was arranged by Defendant's agent, Butch Tharp, and Defendant received a $225,000 fee.

The investment soon proved disastrous for Plaintiff. As interest rates fell, Plaintiff was forced to pay millions of dollars to Homestead. Plaintiff now estimates its losses at twenty-nine million dollars to date.

Plaintiff seeks to hold Defendant liable for these continuing losses based on various theories of fraud and breach of fiduciary duty. Plaintiff's entire case is grounded in one basic charge, however—conflict of inter-

est. According to Plaintiff, Defendant had a longstanding but undisclosed relationship with Homestead which directly conflicted with Defendant's role as Plaintiff's financial advisor. Plaintiff claims that this conflict precluded Defendant from warning Plaintiff about the immense risks of interest rate swaps. Plaintiff contends that Homestead was an improper swap partner, and that Defendant breached its duties by recommending the arrangement.

Defendant maintains that Plaintiff fully understood the risks of the investment. Moreover, by way of defense, Defendant argues that Plaintiff failed to mitigate its damages by selling the swaps or entering into reverse swaps. As to this defense, Plaintiff claims that no other financial institution was willing to assume Plaintiff's obligations, because Homestead was uncredit-worthy. Defendant disputes this contention, and suggests that Plaintiff is speculating on the investment with future profits in mind.

B. *The Discovery Dispute*

Plaintiff filed this action against Defendant on August 25, 1987. With the complaint, Plaintiff served Defendant with its first request for production. Two paragraphs of that request are at issue here:

> 8. All correspondence between you and Homestead Savings.
>
> 9. All documents relating to your association with Homestead Savings, including, but not limited to any contracts or engagement letters and any written or typed drafts of those contracts or engagement letters between you and Homestead Savings, and any correspondence, internal correspondence, notes or memoranda relating to your association with Homestead Savings.

Plaintiff defined "you" and "your" to include all affiliates of Defendant. Defendant filed various objections

to paragraphs eight and nine, including a claim that the request was overbroad in requiring Defendant to ensure production from its affiliates.

Plaintiff filed a motion to compel production soon thereafter. At the hearing, Defendant promised to produce all documents in its "custody, control or possession." Based on that representation, the Court denied the motion to compel from Defendant's affiliates, but granted the motion in all other respects. The parties also agreed that for purposes of production, Blyth Eastman Paine Webber, Inc., and the successor corporation, PaineWebber, Inc., would be treated as parties to the action. *See* Letter of October 4, 1988 at 3.

The parties proceeded with discovery and prepared for trial, which had been specially set for June 19, 1989, after two prior trial dates were continued. While the parties had the normal discovery battles of commercial litigation, the pretrial phase was rather uneventful overall.

This relative quietude was not to last, however. On the eve of trial, Plaintiff learned through independent investigation that Defendant and its affiliates had been involved in bitter litigation with Homestead in three separate lawsuits in the Northern District of California. Defendant had not produced a single document evidencing the California litigation.

II. ANALYSIS

Plaintiff charges that Defendant deliberately sought to conceal the California litigation because to disclose those cases would be to destroy its defense here. Plaintiff's entire complaint is predicated on a theory of conflict of interest based on an undisclosed relationship between Defendant and Homestead. Apart from the significance of the litigation itself, Plaintiff claims that documents produced from the California cases would have revealed volumes of evidence supporting its theory of the case here.

Plaintiff argues that Defendant should have produced documents from the California litigation pursuant to our Order granting in part Plaintiff's Motion to Compel documents relating to the association of Defendant and its affiliates with Homestead. Asserting grave prejudice from this eleventh hour discovery, Plaintiff urges the Court to strike Defendant's pleadings and enter a default. Plaintiff claims that no other sanction will sufficiently punish Defendant and deter likeminded third parties.

Defendant contends that none of the evidence available in the files of the California litigation is relevant to the issues on the merits of this action. Defendant further claims that documents from those cases do not fall within the scope of paragraphs eight and nine of Plaintiff's document request or the Order on Plaintiff's motion to compel.

In addition, Defendant argues that Plaintiff has failed to meet its burden on each element of the standard for determining whether to impose the sanction of default. The ultimate sanction of default may not be imposed unless the following elements are present: (1) Defendant acted wilfully and in bad faith; (2) Plaintiff was prejudiced as a result; (3) no lesser sanction would serve the punishment and deterrence goals of *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), and its progeny. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir.1985); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 131 (SD. Fla.1987). We consider each of these contentions in turn.

A. *Relevance*

The California litigation at issue is comprised of three independent cases. In the first action, Homestead sued Defendant's affiliate, PaineWebber Real Estate Securities,

Inc. ("PWRES"), alleging breach of a mortgage loan servicing agreement. *Homestead Savings v. PaineWebber Real Estate Securities, Inc.*, Case No. 85-6894-RFP (N.D. Cal.) ("*Homestead I*"). In the second action, Homestead sued Defendant and various affiliated companies, seeking to hold these Defendant liable for the conduct of PWRES at issue in *Homestead I* under an alter ego theory. *Homestead Savings v. Paine Webber Group, Inc., Paine Webber Incorporated Capital Markets, PaineWebber, Inc., and Paine Webber Mortgage Finance, Inc.*, Case No. 87-1405-RFP (N.D.Cal.) ("*Homestead II*").

These two actions were settled on June 30, 1987. The various PaineWebber entities, including Defendant and PWRES, brought suit against their insurance carrier seeking recovery of amounts paid in settlement. The carrier also filed a declaratory action in federal court. The federal action was dismissed in favor of state court jurisdiction. *Fireman's Fund Insurance Co., Inc. v. PaineWebber Real Estate Securities, Inc., PaineWebber Group, Inc., PaineWebber, Inc. and PaineWebber Mortgage Fiance, Inc.*, 690 F.Supp. 879 (N.D.Cal.1988) ("*Fireman's Fund*"). As of this date, the state court action is still pending.

The Court has reviewed the pleadings and other record evidence produced to date from the California files. We are convinced that manifestly relevant and material evidence is contained in those files. Indeed, certain pieces of the puzzle, previously missing are located there. By way of example, we will demonstrate some of the ways in which that evidence might have been used at trial here.

1. Whether Defendant had an undisclosed conflict of interest in its dealings with Homestead and Plaintiff.

The California litigation explored a longstanding business relationship between PWRES and Homestead. Defendant contends that relationship is irrelevant in this

action, because PWRES is only an affiliate. It is true that no business relationship between Defendant and Homestead was at issue in the California cases. However, a remarkable fact has come to light through discovery of these cases.

Plaintiff has sued Defendant based in large part on the conduct of Defendant's agent, Butch Tharp. Tharp is allegedly responsible for matching Plaintiff with Homestead, and he allegedly acted as liaison between Plaintiff and Defendant. Plaintiff has always operated under the belief that Tharp was an employee of PaineWebber, Inc. The court file in *Homestead I* reveals for the first time that Plaintiff is mistaken. Tharp was not an employee of PaineWebber, Inc.; he was an employee of PWRES.

This revelation is so remarkable that even if no other new evidence was contained in California files, the Court would rule in favor of Plaintiff on the issue of relevance. Defendant's arguments to the contrary are unpersuasive. Surely the business relationship between Tharp's employer and Homestead is relevant in determining whether Tharp's advice was tainted by a conflict of interest. Moreover, the connection between Tharp, a PWRES' employee, and Defendant PaineWebber, Inc., would appear to undermine Defendant's argument that those two corporate entities are entirely separate.

2. Background on the interest swap placement.

The relationship between PWRES and Homestead provides some interesting background to the subsequent dealings between Plaintiff and Homestead. Certainly, Defendant could have recommended any number of other financial institutions for the interest swaps with Plaintiff. The jury is entitled to know why Homestead was chosen.

3-4. Homestead's financial condition, and Plaintiff's ability to mitigate damages.

One of the most hotly contested issues between the parties in this lawsuit is the question of mitigation. Defendant argues that even if the interest swaps were ill-advised, Plaintiff could have covered its losses by exiting the swaps. If Defendant is correct, Plaintiff might well be left with, at best, a paper victory—a finding of liability, but only nominal damages. Plaintiff's position is that mitigation was impossible because Homestead was uncreditworthy, and hence no other financial institution would have been willing to take Plaintiff's place.

In *Homestead I*, PWRES argued that it should not be held liable for terminating the loan servicing contract with Homestead, because Homestead was unable to meet its side of the bargain. According, to PWRES, the arrangement was disastrous. PWRES' principal theory was management overload in servicing, but it emphasized Homestead's financial losses in the servicing area as well.

For example, in its opening statement, PWRES termed the arrangement a "financial disaster" for Homestead. Moreover, in its pretrial statement, PWRES claimed:

> Evidencing the problems in, and unprofitable operation of, its loan servicing department, Homestead has recently established a $12 million reserve for loan servicing losses. This reserve is the largest loss reserve in Homestead's 99-year history. . . . [Homestead] has advised its shareholders that it is sustaining huge losses i[n servicing]. Moreover, PaineWebber has developed computer analysis of Homestead's servicing portfolio which indicate that Homestead is currently sustaining large losses in its portfolio and would have sustained even larger losses had Homestead purchased additional loans through PaineWebber.

Defendant argues that even though Homestead lost millions of dollars in the servicing area, it made millions

of dollars more in other departments, and therefore remained profitable. Defendant argues that creditworthiness is conclusively established by audited financial statements, which Defendant contends demonstrate the creditworthiness of Homestead for purposes of this litigation.

The Court is not persuaded by Defendant's narrow reading of the record in *Homestead I*. California counsel for Defendant and its affiliates testified at the evidentiary hearing that Homestead had made huge profits in the interest transaction area, which offset its losses in the servicing area. Plaintiff might well argue to the jury that Defendant's pairing of Plaintiff and Homestead was an attempt to compensate Homestead for the losses incurred in the servicing area.

More signficantly, Plaintiff's experts could testify that any other financial institution considering Plaintiff in the interest rate swaps would assess Homestead's business and management record, and not merely its financial records, before agreeing to assume Plaintiff's obligations. Even if Homestead's financial records demonstrate creditworthiness, a financial institution would hesitate before entering into a long-term business relationship with unstable or incompetent management.

Defendant does not dispute that the California files paint a dire picture of Homestead's management and logistical capabilities, at least in the servicing area. Again, in its opening statement, PWRES argues that Homestead did not maintain a budget. PWRES further claims that Homestead led the nation in customer complaints for loan servicing. The Federal Home Loan Bank Board conducted five special audits, and ultimately barred Homestead from further loan servicing without prior approval. PWRES argued that Homestead had "unbelievable problems with turnover," at one point losing more employees than they could hire. According to PWRES, Homestead lost thirty million dollars on five billion dollars worth of servicing. Ironically, these losses were in-

curred as interest rates declined and customers refinanced the loans. Subsequently, Defendant and PWRES' employee Butch Tharp suggested that Plaintiff swap loan obligations with interest rate fluctuations and the inevitable refinancing that results.

The point to be made here is that mitigation and creditworthiness are not issues to be determined by Defendant's unilateral reading of the evidence. These are issues for the jury. Plaintiff is entitled to present its theories of proof, and Defendant can counter with theories of its own. The finder of fact determines whose position is correct.

5. What PaineWebber, Inc. knew about Homestead's condition and when.

If Defendant possessed information indicating that Homestead was an unsuitable swap partner for Plaintiff, or if Defendant should have reasonably known that Homestead was unsuitable, then Defendant may have breached its duties to Plaintiff by recommending the match or by failing to apprise Plaintiff of the true facts.

6. Impeachment

Defendant plans to rely on statements by Homestead official John Halicky to support its contention that Homestead has been creditworthy at all times material to the current litigation between Plaintiff and PaineWebber, Inc. Yet, PWRES argued in *Homestead I* that Halicky had lied under oath about the volume of servicing complaints against the company. Indeed, Halicky denied that any significant number of complaints had been filed, in direct contravention of evidence which later became known to PWRES through discovery from federal agencies. Plaintiff is entitled to pursue this line of impeachment.

B. *Scope of Document Request and Order*

Despite the overwhelming importance of the information contained in the California files, Defendant denies

that Plaintiff was ever entitled to production through paragraphs eight and nine of the document request and the Order granting in part Plaintiff's motion to compel.

Defendant's first line of defense is that litigation does not constitute an "association," which is the term used in the document request, because litigation is distinctly "anti-associational." That argument is absurd. The obvious purpose of paragraphs eight and nine was to discover the scope and extent of Defendant's relationship with Homestead in order to demonstrate a conflict of interest.

Even if we were to accept Defendant's hypernarrow construction of the request, which is rather self-serving, Defendant would not prevail on this point. The California litigation involved a business association between PWRES and Homestead, even if PaineWebber, Inc. was not a contracting party.

That conclusion brings us to Defendant's next argument, which is that Defendant was not required to produce the documents from *Homestead I* because that action was brought only against an affiliate, PWRES. Certainly any documents from *Homestead II* and *Fireman's Fund* concerning Defendant's relationship with Homestead should have been divulged, because Defendant was a named party to those actions. This Court has previously so held. *See* Order to Show Cause.

Defendant cannot ignore its representation to the Court and to opposing counsel that it would produce all documents in its custody, control or possession responsive to the document request. Because of that representation, the Court did not require Defendant to seek production from its affiliates. Defendant was only required to produce documents from its own files and those files that it controls. This ruling is in keeping with the general principle that "control" for purposes of production means a legal right of access. *Searock v. Stripling*, 736 F.2d 650 (11th Cir.1984).

Both California counsel and Defendant's in-house counsel testified that Defendant enjoyed the right of access to all attorney files for Defendants in the California litigation.[3] Moreover, Defendant's paralegal testified that while she was not sent to pursue discovery in California, she was instructed in her other discovery efforts to search for any documents evidencing a relationship between Homestead and PaineWebber, Inc. *or any of its affiliates*. Defendant in fact produced other documents evidencing relationships between Homestead and PaineWebber affiliates. For these reasons, the Court rejects Defendant's argument that the document request, as modified by the Court's Order on the motion to compel, did not seek affiliate records in Defendant's possession, custody or control.[4]

In any event, Defendant cannot escape the fact that if it had met its obligation to disclose *Homestead II*, or even *Fireman's Fund*, Plaintiff would have been led inevitably to the *Homestead I* litigation. Apart from the obvious relationship between the three cases, each of the docket sheets contains a related case order referring the reader to the principal action. Under these circumstances, even if the Court were inclined to accept Defendant's affiliate theory, which we are not, we would still hold Defendant responsible for Plaintiff's lack of access to *Homestead I*.[5]

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[3] While Mr. Boutin testified that this right of access was limited by attorney-client and work product privileges, we did not find his testimony in that regard to be either credible or correct. Mr. Salzberg, who coordinated production for Defendant in this action, represented both PWRES and PaineWebber, Inc. as liaison to California counsel. Neither Mr. Salzberg nor Mr. Keesal, lead California counsel and a highly credible witness, even hinted at any contraints on Defendant's access to the records.

[4] Indeed, the document request itself sought all documents in Defendant's custody, control or possession, by its very terms.

[5] Defendant also argues that the parties limited the scope of production to interest swap transactions only. However, the record is devoid of proof in support of that proposition, and the Court

C. *Intent*

Defendant is thus left without any justifiable excuse for its failure to produce documents from any of the three California cases. Even so, Defendant claims that the Court cannot enter a default because Plaintiff has been unable to unearth specific proof of bad faith or intent on the part of Defendant in its discovery violation. Plaintiff responds that the record speaks for itself on the question of intent, and that Defendant should not be permitted to escape the rule simply because no "smoking gun" has been found.

The sanction of default is an extreme remedy, but it is within a district court's broad discretion to resort to it when appropriate. Default may be imposed when the conduct of the targeted party amounts to "willfulness, bad faith, or . . . fault." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640, 96 S.Ct. 2778, 2779, 49 L.Ed.2d 747 (1976). "Fault" is an amorphous concept, but it has been defined to authorize the sanction of default where counsel has "disregarded" its professional responsibilities in the discovery process or to the court, *see Aztec Steel Co. v. Florida Steel Corp.*, 691 F.2d 480, 481 (11th Cir.1982), or where counsel's conduct rises to the level of "gross negligence," *see Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir.1979). Thus, where specific proof of intent eludes the movant, default is still appropriate when counsel "clearly should have understood his duty to the court." *Cine Forty-Second Street*, 602 F.2d at 1068.

The Court will separately assess the culpability of in-house and local counsel in applying this standard to the record before us. By way of prelude, we note that the participation of in-house counsel obviates any concern that the Court avoid visiting the sins of the lawyers on

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cannot even imagine Plaintiff agreeing to restrict its request to such narrow bounds.

the client. In this case, in-house counsel supervised local counsel in the defense of the action, and actively participated in discovery decisions. Moreover, members of in-house counsel hold senior positions in the corporation. Under these circumstances, any fault of in-house or local counsel should be imputed to the client.

1. In-house counsel

It should come as no surprise that in-house counsel to PaineWebber, Inc. had complete knowledge of all critical facts underlying the motion to strike. With an insider's vantage point, in-house counsel fully appreciated, perhaps more than local counsel, the significance of the California litigation to this action.

The assistant general counsel, Robert Salzburg, and general counsel, Berson, acted as the principal liaison for both PaineWebber, Inc. *and* PWRES to the independent California counsel in all three California cases. Salzburg explained that he acted as counsel to PWRES because PWRES did not have its own inside counsel. Moreover, in-house counsel James Treadway signed the joint settlement agreement for *Homestead I* and *II* on behalf of all PaineWebber entities, as counsel to PaineWebber, Inc., and with a power of attorney for PWRES.

At the evidentiary hearing on the motion to strike, Salzburg made a passing attempt to shift the responsibility for production decisions to local counsel, without success. Salzburg was the first to review the complaint and document request. He hired and supervised local counsel. Moreover, Salzburg was the designated records custodian for PaineWebber, Inc. at the deposition conducted pursuant to Federal Rule of Civil Procedure 30 (b)(6). If any doubt remains, we note that Salzburg testified that he ratified all of local counsel's actions preceding the motion to strike.

2. Local counsel

Local counsel admits knowledge of *Homestead I*, but claims that in-house counsel neglected to inform them of

Homestead II or *Fireman's Fund*. Local counsel, Bennett Falk and Keith Olin, met with California counsel, Peter Boutin, in May 1988. The parties discussed *Homestead I*. Falk claims that he asked Boutin whether PaineWebber, Inc. had any involvement in the litigation and was told that it did not. Boutin does not recall this exchange.

Local counsel did review some of the pleadings from *Homestead I* at the meeting, but they made no effort to search the files for documents responsive to Plaintiff's document request. Salzburg, who arranged the meeting between local and California counsel, testified that counsel did not plan to search the files there. He did not explain what the purpose of the meeting might otherwise have been.

When Falk and Olin returned to Miami, they briefed their colleague O'Bannon Cook on the meeting. Shortly thereafter, Cook defended Butch Tharp's deposition. Cook knew that Tharp was a PWRES' employee; he knew that Homestead had just settled an action against PWRES in California. Yet Cook interfered with Plaintiff's attempts to nail down which corporate entity Tharp was referring to in his deposition, and Tharp was studiously imprecise. Indeed, to deflect the fire from Tharp, Cook promised to review the transcript of the deposition and correct any responses which were incorrect in reference to a PaineWebber entity.

Cook wholly failed to meet his obligations in that regard. Tharp's testimony was entirely misleading to Plaintiff, and Cook did nothing to correct it. In particular, Cook failed to correct the record to reflect that Tharp was an employee of PWRES, and not of PaineWebber, Inc.

When pressed for an explanation, Cook testified that it was a mere oversight, and that he did not intend to hide Tharp's affiliation with PWRES. The Court rejects that testimony. According to Cook, it would have been irra-

tional for him to think that he could hide the PWRES connection, because Plaintiff was bound to be tipped off by other evidence. However, the only other evidence shown in the record on this point is that Plaintiff has done a substantial amount of business with PWRES. The significance of that fact escapes the Court. Plaintiff's connections with PaineWebber entities were not at issue; Homestead's connections were. Lacking critical knowledge of Tharp's PWRES' affiliation, Plaintiff had no reason to pursue PWRES in discovery by subpoena or otherwise.

Moreover, that Defendant almost succeeded in keeping the truth hidden belies counsel's protests that it could not reasonably have thought it could do so. In the face of this argument, Cook claims that he should not be blamed for his lack of specificity to opposing counsel, because, "People just don't talk that way" about corporate entities. In response, the Court would remind counsel that lawyers should "talk that way," especially when they promise to do so.

The Court is also disturbed by the fact that, to this day, no counsel for Defendant has searched the *Fireman's Fund* files for documents sought by Plaintiff in this action. California counsel (Bennett) testified that even when local counsel travelled to California after the first hearing on Plaintiff's motion to strike, local counsel searched the "Keesal files" only, meaning *Homestead I* and *II*, and not the *Fireman's Fund* files, even though those files were freely available to them.

3. Analysis

The Court has considered the full record and in particular the testimony of Defendant's counsel. Counsel fully appreciated the impact that disclosure of the California litigation would have on this action. Counsel's failure to produce documentation cannot be said to have

been a mere oversight, when the evidence withheld is of such importance and no reasonable excuse is offered.

The sequence of events early in the litigation compels the conclusion that counsel made a deliberate choice to bury the evidence and prevent disclosure. In May 1988, local counsel met with California counsel to discuss *Homestead I*, but failed to search the files for responsive documents. In June 1988, Cook defended Tharp's deposition, and failed to disclose the witness' affiliation with PWRES. In July 1988, Cook represented to the Court that Defendant would produce all responsive documents in its custody, control or possession if the Court would deny Plaintiff's motion to compel production from the files of Defendant's affiliates. Defendant failed to do so.

In short, Defendant did its utmost to keep Plaintiff in the dark, and the truth hidden. Local counsel failed to produce documents from *Homestead I*. In-house counsel failed to produce documents from *Homestead II* or *Fireman's Fund*. Cook diverted Plaintiff from the truth at Tharp's deposition, and then broke his promise to correct the record. Cook manipulated the Court into narrowing Plaintiff's document request to prevent disclosure from affiliates, including PWRES, and then broke his promise to produce records from Defendant's own files. That representation to produce all documents in Defendant's control was the foundation of the Court's Order denying production from affiliates.

Having ensured that Plaintiff would not learn about the California litigation on its own, Defendant then disregarded its duty to produce documentation evidencing that litigation. Indeed, if counsel is to be believed, Defendant also failed to search its own corporate files in New York to determine if relevant documents existed there. Given the record existing at this point, it seems more likely that Defendant simply chose to withhold relevant evidence from New York, as well as California. The Court does not reach that question on the record before us. However,

it is abundantly clear that, at a minimum, counsel failed to meet its obligation to search Defendant's corporate and attorney files for responsive documentation.

Thus, the Court finds that ample evidence exists in the record to support a finding of willfulness by Defendant and Defendant's counsel in withholding critical evidence in the face of a court order compelling disclosure. Moreover, even if the record did not support a finding of intent, there can be no question that counsel acted in complete disregard of its responsibilities to opposing counsel and to the Court in the discovery process, either deliberately, or through gross negligence. Accordingly, the Court concludes that it is empowered to choose the sanction of default from its arsenal if the remaining elements of the three-pronged test are met.

D. *Prejudice*

There can be no question that Plaintiff has been prejudiced as a result of Defendant's conduct. Plaintiff learned of Defendant's discovery violation on the eve of trial. Plaintiff was poised to present its case when volumes of new evidence were uncovered. Considering the complex nature of this litigation, the prejudice to Plaintiff from the wasted trial preparation is substantial.

Moreover, the newly discovered evidence radically alters the nature of Plaintiff's case. We have already demonstrated the materiality of the documents. The import of the evidence previously withheld goes beyond materiality, however. An entirely different player has entered the field—PWRES. Plaintiff may well seek to add PWRES as a party defendant now that Tharp's PWRES' affiliation has come to light. Even if Plaintiff chooses not to pursue that course, Plaintiff will still be forced to pursue avenues of discovery to explore the contours of Homestead's relationship with PWRES in order to support its theory of conflict of interest.

Despite this irrefutable proof of prejudice, Defendant contends that, as a matter of law, Plaintiff cannot be held to have been prejudiced because Plaintiff could have subpoenaed the documents directly from PWRES but failed to do so. Defendant would apparently have the Court excuse its misconduct based on some theory of comparative fault. We decline to do so.

To accept Defendant's position would vitiate the purpose of the sanctions rule. When a party has been ordered to produce documents, and those documents are in its control, Defendant must produce the documents or else face the consequences. There is simply no other choice. It is not within Defendant's prerogative to complain that Plaintiff might have secured the documents from some other source. Defendant has been ordered to produce them, and Defendant must comply.

To hold otherwise would undermine the authority of the Court and the integrity of the system. Negligence by Plaintiff cannot erase willful misconduct by Defendant in defiance of a court order. Defendant's suggestion to the contrary is unseemly. Defendant's obvious purpose is to divert attention from its own wrongdoing by pointing the finger at Plaintiff.

Searock v. Stripling, 736 F.2d 650 (11th Cir.1984), relied on by Defendant, is inapposite. In *Searock*, the Eleventh Circuit held that default is improper when counsel's failure to comply is due to an inability to provide discovery rather than willfulness or bad faith conduct. The documents at issue in *Searock* were in the custody and control of a third party, and not the defendant. Both parties knew this to be the case. Defendant had only volunteered to procure the documents from the third party, but the third party refused to cooperate. In passing, the court observed that the movant might have easily subpoenaed the evidence directly from the third party custodian. That case therefore has no application

where counsel fails to produce documents in its possession, custody, or control.

In any event, even if the Court were inclined to adopt Defendant's rather novel comparative fault theory, we would find that it has no application on the record before us. Plaintiff has been more than diligent in pursuing discovery in this case. Plaintiff had no reason to target PWRES with subpoenas for the documents at issue here. Plaintiff did not even know that these particular documents existed. This is not a case in which Plaintiff knew that a third party, and not Defendant, possessed the documents, and yet sat idly by while Defendant refused to procure them. Plaintiff has conducted itself with the utmost good faith, and we decline to penalize Plaintiff for Defendant's wrongdoing.

Based on this analysis, the Court concludes that Plaintiff has made a sufficient showing of prejudice to support entry of default should the Court in its discretion decide to impose it. Plaintiff has also offered an independent argument for a finding of prejudice in the form of financial detriment to the Plaintiff corporation. Defendant strongly opposes Plaintiff's position.

According to Plaintiff, it has been prejudiced by Defendant's intransigence because the day of judgment has been postponed. If Plaintiff is entitled to prevail on the merits, Plaintiff would like immediate access to the fruits of victory. Plaintiff claims that it is unable to sell stock to raise capital. Plaintiff contends that it barely meets the capital requirements of federal law, and that the federal capital requirements are about to be increased. Plaintiff further claims that it is unable to raise money on the capital market. Finally, Plaintiff reminds the Court that the potential judgment in this case represents about one half of its current capital base.

Defendant dismisses Plaintiff's argument as "nonsensical." According to Defendant, the Court should decline to recognize any prejudice to a plaintiff from the lack of

access to money damages which the plaintiff may not be entitled to on the merits. Any prejudice on this grounds is, to Defendant, purely speculative.

The Court listened closely to the testimony of Bank-Atlantic official Alan Levan, both on direct and cross-examination. We listened patiently to counsel's heated arguments on this point. We have concluded that the entire debate, while interesting, is unnecessary. Plaintiff has demonstrated ample prejudice through the time and expense of wasted trial preparation. On a motion for default, no further proof of prejudice is necessary. The Court declines to fashion a rule that would hold a defendant responsible for the very existence of the opposing party due to a delay of trial, even if the delay is due to the ~~fault~~ of the defendant, unless the defendant by its conduct actually sought that result. However, in consideration of a remedy, the Court will remain sensitive to Plaintiff's financial position.

E. *Alternative Sanctions*

Plaintiff contends that the Court has no choice but to enter a default because Defendant's conduct was willful and Plaintiff has been prejudiced as a result. We disagree. The Court recognizes that it must consider the availability of lesser sanctions before resorting to a default. Neither party has proposed alternative sanctions here.

Default is a draconian measure that should be imposed only in exceptional cases. Even if the court finds that counsel's conduct was willful, default is not mandatory. The court should not be quick to forfeit a party's right to a full and fair trial on the merits. Instead, the court must fashion a sanction that is proportionate to the particular offense, while keeping the deterrence and punishment goals of the rule in mind. At the same time, the court should order compensation to the movant in an effort to cure any demonstrable prejudice.

This determination involves a sliding scale analysis. The more culpable Defendant's conduct, the greater the sanction that is required. If Defendant's conduct is highly culpable, then prejudice to Plaintiff is not the focal point. The judicial system must be vindicated and likeminded parties deterred.

The Court has carefully considered the record in this case in an effort to resolve the competing interests at stake. In our view, this presents a very close case on the issue of default. Upon reflection, however, the Court has determined that default is not an appropriate sanction, because lesser sanctions will serve the punishment and deterrence goals of the rule. The Court is convinced that Defendant acted willfully and in bad faith. However, in our view, a twenty-nine million dollar default would be a disproportionate sanction for violation of a single Order, on the basis of the evidence presented by Plaintiff to date.

This determination is not to be taken as approval of Defendant's conduct. On the contrary, should Plaintiff discover any further evidence of intentional misconduct by Defendant, on this matter or in the future course of the litigation, we invite Plaintiff to renew its motion. Further evidence to that effect may well tip the balance in favor of granting the motion.

III. CONCLUSION

The Court has concluded that Defendant withheld evidence in bad faith and in violation of a prior Order. Plaintiff has been seriously prejudiced as a result of Defendant's discovery violation. In order to redress Plaintiff and implement these findings on the record, it is hereby ORDERED as follows:

1. Plaintiff's motion to strike is DENIED without prejudice to renew, as outlined above.

2. This cause is hereby specially set for trial on October 9, 1989, with a calendar call to be held on October 4,

1989 at 9:30 a.m. The Court will grant an additional thirty day continuance for good cause shown. The Court stands ready to proceed to trial immediately should Plaintiff elect to decline further discovery.

3. No later than twenty calendar days from entry of this Order, Defendant shall produce all witnesses requested by Plaintiff in Miami for deposition.

4. No later than ten calendar days from entry of this Order, Defendant shall produce all documents from California and New York requested by Plaintiff and responsive to paragraphs eight and nine of the first document request. The documents shall be produced in Miami, or, at Plaintiff's option, shall be made available to Plaintiff in California and New York.

5. Defendant, PaineWebber, Inc., and local counsel, Ruden, Barnett, McClosky, Smith, Schuster & Russell, shall bear equally the reasonable costs of Plaintiff's time and preparation in filing the Motion to Strike and in preparing for the new trial date, including the costs of expedited discovery.

6. Defendant and local counsel shall immediately post a $250,000 cash bond to secure Plaintiff's costs and fees.

7. The amount of costs and fees is to be determined post-trial. The parties shall first attempt to reach a resolution of that issue without the assistance of the Court. Should the parties fail to agree, Plaintiff shall file a motion for costs and fees with supporting affidavits.

8. Defendant shall keep a daily log of all efforts to comply with discovery obligations from this date forward, and shall file on the record a detailed report on these efforts every fifteen calendar days from entry of this Order to the date of trial.

9. Should Plaintiff ultimately prevail on the merits of this action Defendant shall be liable for triple interest at the statutory rate, to be fixed as of June 19, 1989, and to run from that date forward.

10. All privileges except settlement privilege previously available to Defendant in discovery of the California litigation are considered waived by reason of Defendant's failure to assert the privilege at the time of the document request. The Court is not disposed to consider any further assertion of privilege by Defendant in regard to that discovery. However, the Court will consider an assertion of privilege in an extreme case. The Court further counsels Plaintiff to exercise restraint in the use of privileged documents. The Court will not countenance any objections as to relevance or overbreadth.

11. At trial, the jury will be instructed on Defendant's failure to provide discovery as one factor to be considered in determining Defendant's liability. The Court will address this issue in a subsequent Order. The parties are advised that the Court is of the view that concealment of evidence, like flight from law enforcement, is an appropriate consideration on the merits for the factfinder.

12. By way of this Order, the Court hereby advises the Honorable Robert F. Peckham, United States District Judge, Northern District of California, of Defendant's use of the confidentiality orders entered in actions before Judge Peckham to secrete documents sought on the merits of this action. The Court requests that Judge Peckham immediately reconsider and lift those orders so that Plaintiff may pursue discovery. Defendant shall move for an Order to that effect forthwith.

13. The Court intends to publish this Order in the official reporters to deter future misconduct by Defendant and likeminded third parties.

14. The Court has not excluded the possibility of appropriate fines to be imposed on Defendant and counsel, in addition to the sanctions outlined above. The Court reserves that issue post-trial.

DONE and ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FT. LAUDERDALE,
Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER INC., n/k/a PAINEWEBBER, INC.,
Defendant.

MEMORANDUM

[Filed Oct. 27, 1989]

Plaintiff has moved to exclude from evidence any testimony regarding Alan Levan's business transactions, ownership interests and income from Bank Atlantic. Plaintiff argues that such evidence is not relevant. Plaintiff further contends that even if the evidence is relevant, it is too prejudicial to submit to the jury. Defendant argues that the evidence is relevant to show Levan's bias and interest in the outcome of litigation as well as Plaintiff's motive in bringing this action.

I.

The partiality of a witness is subject to exploration at trial, and is " 'always relevant as discrediting the witness and affecting the weight of his testimony.' " *Davis v. Alaska*, 445 U.S. 308, 316, 94 S.Ct. 1105, 1110 (1974)

(citing 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)). Because of the importance of evidence of bias or interest, inquiry into the area is never collateral. *United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir. 1987). While the Court may exercise discretion over the extent of proof, it must ensure "ample latitude for pertinent inquiry." *Wynn v. United States*, 397 F.2d 621, 624 (U.S. App. D.C. 1967) (footnote omitted). Counsel attempting to show bias or interest must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witnesses" *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111. Under these principles, the Court concludes that evidence of Alan Levan's ownership interests and income from BankAtlantic is sufficiently probative of his possible bias or interest in the outcome of this litigation, and is thus relevant.

II.

As in the case of other relevant evidence, evidence of bias may be inadmissible when it creates a danger of unfair prejudice, confusion of the issues, misleading of the jury, or results in a needless presentation of cumulative evidence. Fed. R. Evi. 403. Here, Plaintiff argues that the probative value of the bias and interest evidence concerning Alan Levan is outweighed by unfair prejudice. However, just as Plaintiff underestimates the relevance of the evidence, it also overrates its prejudicial effect on the jury. While the evidence may be unfavorable to Plaintiff, we do not view it as inflammatory in the context of this record, i.e., the sort of evidence that arouses the irrational passions of a jury. *See Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983) (evidence must be more than "damning" to be excluded under Rule 403, it must be "inflammatory"). It would therefore be inappropriate to exclude this evidence under Rule 403 of the Federal Rules of Evidence. Given the relevance of the evidence and its limited prej-

udicial effect, admission of testimony regarding Alan Levan's relationship with BankAtlantic is warranted. Plaintiff's motion is therefore denied.

III.

The Court emphasizes that at this juncture our ruling is limited to permitting Defendant to elicit this testimony on cross-examination if Levan is called in the Plaintiff's case-in-chief. While the Court recognizes that under Rule 607 of the Federal Rules of Evidence the credibility of a witness may be attacked by any party, it would be an abuse of that rule for Defendant to call Alan Levan as a witness merely to elicit this testimony. *See United States v. Capella*, 479 F.2d 1153, 1158 (10th Cir. 1973) (only purpose of impeachment is to neutralize damaging testimony); *Gorgon v. United States*, 383 F.2d 936, 940 (U.S. App. D.C. 1967) (legitimate purpose of impeachment is not to show that the accused who takes the stand is a "bad person" but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses); (*United States v. Miller*, 664 F.2d 94 (5th Cir. 1981) (prosecutor may not use prior inconsistent statement of hostile government witness which tends to inculpate defendant, under the guise of impeachment, for primary purpose of placing before jury substantive evidence which is not otherwise admissible); *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984) (it would be an abuse of Rule 607 for prosecution to call witness that it knew would not give useful evidence, just so it could introduce hearsay evidence against defendant in hope that jury would miss stuble distinction between impeachment and substantive evidence or would ignore it). Indeed, during oral argument, defense counsel admitted as much. Therefore, if Plaintiff elects not to call Alan Levan, the Court takes no position as to whether, and, under what circumstances, the Defendant can call and impeach Levan from the financial evidence. At that point, we will await

a proffer by the Defendant demonstrating the relevancy of the testimony. We will then exercise our sound discretion over the extent of the proof that Defendant may elect to impeach Levan from his financial relationship with BankAtlantic. *Wynn v. United States*, 397 F.2d at 624.

DONE and ORDERED in Open Court at Miami, Florida this 22nd day of October, 1989.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC, A Federal Savings Bank, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INCORPORATED, n/k/a PAINEWEBBER, INCORPORATED,

Defendant.

ORDER

[Filed Aug. 14, 1990]

This case is before the Court upon Plaintiff's Motion for New Trial and Supplemental Motion for New Trial. The motions raise three distinct claims of juror misconduct as the basis for a new trial. The Court has considered the arguments of counsel, the pertinent legal authorities and the in camera testimony of all jurors participating in the verdict. It is now ready to rule.

I. DISCUSSION

A. *Extrinsic Evidence*

Plaintiff first argues that a new trial should be granted because the foreman of the jury, Anthony Lippert, read a newspaper article published in the *Miami Review* containing extraneous and prejudicial information. In assessing this claim of juror misconduct, the Court in-

itially notes the applicable standard as set forth by the Eleventh Circuit:

> When jurors consider extrinsic evidence, we require a new trial if the evidence poses a *reasonable possibility of prejudice* to the [movant]. *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984); *United States v. Howard*, 506 F.2d 865 (5th Cir. 1975). Prejudice is not presumed. The [movant] has the burden of demonstrating prejudice by a preponderance of credible evidence. *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir. 1979). "Such evidence may be shown by evidence that extrinsic factual matter tainted the jury's deliberations." *Id.* However, since it is the court's duty to ensure that the jury verdict was in no way tainted by improper outside influences, the court must investigate the asserted impropriety upon merely a colorable showing of extrinsic influence. *Id. See also, Sheppard v. Maxwell*, 384 U.S. 333, 362-63, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). Subject only to Federal Rule of Evidence 606(b), the court may use whatever inquisitorial tools are necessary and appropriate to determine prejudice. *United States v. Savage*, 701 F.2d 867, 871 (11th Cir. 1983). If after this inquiry the court determines that the [movant] met his burden of showing by a preponderance of the evidence the likelihood of jury prejudice, the burden shifts to the [non-movant] to prove that the consideration of the extrinsic evidence was harmless. *United States v. Perkins*, 748 F.2d at 1533; *United States v. Howard*, 506 F.2d at 869. In recognizing the degree of prejudice required and the [non-movant's] burden to establish harmless error, the strength of the [non-movant's] case has a bearing on the issue of prejudicial error. *United States v. Spurlock*, 811 F.2d 1461, 1463 (11th Cir. 1987). Also relevant is the nature of the information learned by the jurors and the manner in which it

was revealed. *Government of Virgin Islands v. Dowling*, 814 F.2d 134, 138 3d Cir. 1987).

United States v. Rowe, No. 88-8850, slip op. at 3913 (11th Cir. July 24, 1990) (emphasis in original).

In accordance with its duty to investigate, the Court conducted in camera interviews of all eight jurors that participated in the verdict. Based upon the jurors' responses under oath during the interviews and the Court's assessment of each juror's credibility, the Court makes the following findings:

1. Prior to closing arguments, juror Lippert read an article published by The Miami Review on November 13, 1990 entitled *A Big Week for Bankatlantic.*

2. Another member of the panel, juror Capo, saw only the headline of the article while driving by a newspaper vending machine. Juror Capo related this fact to the other jurors and when she did, juror Lippert replied that the article had nothing to do with this case.

3. The jury never discussed the substance of the newspaper article during the trial or the jury's deliberations.

4. Only juror Lippert read the newspaper article. Over the course of the trial and the deliberations in this case, none of the other members of the panel had any knowledge about the contents of the newspaper article.

The Court is convinced that these facts do not establish the level of prejudice necessary to warrant a new trial. Indeed, based on the nature of the extrinsic influence and the extent of juror exposure, the Court finds that Plaintiff has not even met its burden of demonstrating prejudice by a preponderance of the evidence. Defendant is therefore not required to prove that the consideration of the extrinsic evidence was harmless. *See United States v. Rowe*, No. 88-8850, slip op. at 3914 (11th Cir. July 24, 1990) (holding that government was not required to show harmlessness, where defendant failed to show by a

preponderance of evidence the likelihood of prejudice from jurors' consideration of extrinsic evidence).

The newspaper article at issue in this case is not sensational in nature. It is a factually oriented account of Plaintiff's financial condition and its involvement in another lawsuit with its shareholders ("the Borkson litigation"). The actual facts contained in the article relating to the *Borkson* shareholder suit are not prejudicial. Plaintiff contends that the *Borkson* evidence must be prejudicial because the Court excluded it at trial. However, the Court excluded evidence concerning the *Borkson* litigation because it was irrelevant, and not because it was prejudicial. The remaining facts in the article relating to BankAtlantic's financial standing and the suit against PaineWebber are also not prejudicial. The article says nothing that the jury had not already heard during the trial of this case. Indeed, the facts contained in the article, if introduced at trial, would have been merely cumulative of the existing facts already in evidence. The article cannot therefore be considered so prejudicial as to warrant a new trial.

Additionally, the newspaper article was read by only one juror who deliberated in this case. None of the other jurors had any knowledge of the substance of the article. The jury never discussed the contents of the article during the trial or the deliberations. In fact, the juror who did read the article testified that in his view, the article had nothing to do with this case. Juror Lippert also testified that the article had no effect on his verdict.[1] This Court observed juror Lippert during his interview and finds his testimony credible.

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[1] The Court acknowledges that juror Lippert's testimony that the extrinsic information was harmless is not controlling. *United States v. Bollinger*, 837 F.2d 436, 440 (11th Cir. 1988). However, since it may be considered as a factor in evaluating a claim of juror exposure to prejudicial extrinsic evidence, *id.*, the Court has included this aspect of juror Lippert's testimony in its assessment of Plaintiff's claim.

Given the facts and circumstances of this case, the Court cannot agree with Plaintiff's position that harmful prejudice invaded the jury deliberations and tainted the verdict in a way that denied Plaintiff a fair trial. Juror Lippert's reading of the newspaper article simply did not so taint the jury as to create a reasonable possibility of prejudice to Plaintiff. Since Plaintiff has failed to prove the likelihood of jury prejudice by a preponderance of the evidence, this incident of juror misconduct cannot serve as the basis for a new trial.

B. *Voir Dire Examination of Jurors Chanquet and Lippert*

Plaintiff further argues that a new trial is warranted on the ground that jurors Chanquet and Lippert provided untruthful answers to questions posed to them on *voir dire*. Specifically, Plaintiff contends that juror Chanquet failed to disclose the fact that a judgment had been entered against him in a lawsuit in which the federal government contended that he obtained student loans on the basis of false information. With respect to juror Lippert, Plaintiff asserts that juror Lippert failed to disclose his employment as a real estate salesman with a real estate company that is owned by an attorney who attended law school with one of the partners of the law firm representing Defendant in this litigation.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), the Supreme Court established the standard for granting a new trial in cases where pertinent information was not disclosed on *voir dire*:

> to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but

> only those reasons that affect a juror's impartiality can truly be said to affect fairness of a trial.

Id. at 556, 104 S.Ct. at 850.

For purposes of this motion, the Court assumes that Plaintiff has satisfied the first requirement of the *McDonough* test. The Court finds, however, that Plaintiff cannot satisfy the second requirement. Plaintiff has not shown that correct responses by jurors Chanquet and Lippert would have supported a challenge for cause.

"A party who seeks a new trial because of nondisclosure by a juror during *voir dire* must show actual bias." *United States v. O'Neill*, 767 F.2d 780, 785 (11th Cir. 1985) (quoting *United States v. Tutt*, 704 F.2d 1567, 1569 (11th Cir.) (per curiam), *cert. denied*, —— U.S. ——, 104 S.Ct. 174, 78 L.Ed.2d 156 (1983). "Actual bias may be shown in two ways: by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984) (citations omitted).

In this case, there has been no admission of bias. Nor does the evidence support a presumption of actual bias. Neither Chanquet's involvement in civil litigation dissimilar to this litigation nor Lippert's employment with a real estate company owned by a former classmate of one of Defendant's attorneys constitute actual bias. Lippert and Chanquet have no connection to either party in this case or to similar litigation. Neither party had a motive to conceal information just to get on the jury and find against BankAtlantic. Indeed, to the contrary, the evidence demonstrates Lippert and Chanquet's willingness to serve as impartial members of the jury. *See* Trial Transcript, Vol. 1, pages 38 and 39; March 30, 1990 Transcript, pages 36 and 41. Absent a showing that the Court would have excused the jurors for cause if they had disclosed the omitted responses, Plaintiff's claim that it is

entitled to a new trial because of the nondisclosures of these two jurors on *voir dire* must also fail.[2]

II. CONCLUSION

In accordance with the foregoing, the Court concludes that the evidence in this case was fairly and impartially considered by a fair and impartial jury. It is therefore ORDERED as follows:

1. BankAtlantic's Motion for New Trial on the Basis of Newly Discovered Evidence is DENIED.

2. BankAtlantic's Supplemental Motion for New Trial is DENIED.

3. The Court retains jurisdiction for the purpose of determining the pending motions for attorneys' fees and costs.

DONE AND ORDERED in Chambers at Miami, Florida this 14 day of August, 1990.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

[2] Having failed to meet the *McDonough* criteria, Plaintiff is precluded from making its claim for new trial based on the right of peremptory challenges. *See United States v. O'Neill*, 767 F.2d 780, 786 n.4 (11th Cir. 1985) ("[W]e hold that . . . the defendants' failure to meet the *McDonough* standard precludes the claim based on the right of peremptory challenges."); *Urseth v. City of Dayton*, 680 F. Supp. 1084, 1091 (S.D. Ohio 1987) ("Not remaining viable after *McDonough*, however, is the second ground for a new trial set forth in *McCoy*, to wit: 'a district judge shall presume bias, and grant a new trial, when a juror deliberately conceals information or gave a purposefully incorrect answer.' ").

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,
Plaintiffs,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., n/k/a PAINEWEBBER, INC.,
Defendant.

ORDER

[Filed Mar. 8, 1990]

This cause is before the Court upon Plaintiff's Motion for Evidentiary Hearing and for New Trial on the Basis of Newly Discovered Evidence. Plaintiff contends that the jury was improperly influenced by extraneous information during the course of deliberations. Specifically, Plaintiff maintains that at least one member of the jury read a newspaper article published in the *Miami Review* despite the Court's admonitions to the contrary. The article discussed this action as well as the *Borkson* shareholder suit against Plaintiff.

Plaintiff moves pursuant to Federal Rule of Evidence 606(b) for an evidentiary hearing and, ultimately, pursuant to Federal Rule of Civil Procedure 60(b), for a new trial. Generally, under Rule 60(b), Plaintiff is required to establish five elements:

1. the evidence is newly discovered since the final judgment was entered;

2. Plaintiff has exercised due diligence to discover the new evidence;

3. the evidence is not merely cumulative or impeaching;

4. the evidence is material;

5. the evidence is such that it is likely to produce a new outcome if the case were retried.

Taylor v. Texas Corp., 831 F.2d 255 (11th Cir. 1987). The evidence was discovered on February 2, 1990, subsequent to the final judgment entered on November 24, 1989. Plaintiff filed the motion on February 13, 1990. We do not believe that any further diligence by Plaintiff can be reasonably required. As to the third element, evidence that the jury reviewed extraneous materials, by its very nature, cannot be cumulative or impeaching.

Plaintiff need not meet the final two elements of the standard in view of the rebuttable presumption standard provided in *Remmer v. United States*, 347 U.S. 227, 229 (1954).[1] "When jurors consider extrinsic evidence, a new trial is required if the evidence poses a reasonable possibility of prejudice to the [movant]. Prejudice from extrinsic evidence is assumed in the form of a rebuttable presumption and the [nonmovant] bears the burden of demonstrating that the consideration of the evidence was harmless." *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984) (citations omitted); *United States v. Bolinger*, 837 F.2d 436 (11th Cir. 1988).[2]

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[1] Although *Remmer* was a criminal case, the presumption applies equally to civil cases. *See United States v. Harry Barfield Co.*, 359 F.2d 120, 124 (5th Cir. 1966); *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532 (4th Cir. 1986).

[2] We recognize that the Supreme Court appears to have receded somewhat from the *Remmer* presumption, *see, e.g., Smith v. Phillips*,

The Court emphasizes that the presumption of prejudice is not conclusive. Defendant may rebut the presumption with "factors such as the nature of the extrinsic evidence and the strength of the [trial] evidence." *Bolinger*, 837 F.2d at 440. However, in our view, Plaintiff has met its initial burden, and is therefore entitled to an evidentiary hearing to determine whether a new trial is warranted.

Accordingly, it is hereby ORDERED as follows:

1. Plaintiff's Motion for Evidentiary Hearing is GRANTED. The evidentiary hearing will be set by separate order.

2. The Clerk is directed to provide the Court with the names, addresses and telephone numbers of the jurors so that the Court may provide them with notice of the hearing.

3. The hearing will be limited to the objective evidence, *i.e.*, "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." FRE 606(b). The jurors will not be permitted to testify as to whether the extraneous materials affected their decision. *See Perkins*, 748 F.2d at 1534 n.15.

4. All questions will be posed by the Court. However, the Court will consider proposed questions filed by counsel within ten (10) days of this Order. Counsel shall attend the hearing and will be permitted to present oral argument at the close of the testimony.

5. Plaintiff's Motion for New Trial is DEFERRED pending consideration of the jurors' testimony and the

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455 U.S. 209 (1982). However, the Eleventh Circuit has strictly applied the *Remmer* presumption notwithstanding *Smith*. *See, e.g., Bolinger*, 837 F.2d 436; *Perkins*, 748 F.2d 1519. *Contra Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1146 (5th Cir. 1988) (*Smith* "no longer assumes jury prejudice").

arguments of counsel to be presented at the evidentiary hearing.

DONE and ORDERED in Chambers at Miami, Florida on this 8 day of March, 1990.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-6643-CIV-SCOTT

BANKATLANTIC f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,
Plaintiff,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., n/k/a PAINEWEBBER, INC.,
Defendant.

FINAL JUDGMENT

[Filed Nov. 24, 1989]

Consistent with the jury verdict of November 14, 1989 in favor of Defendant, final judgment is hereby entered in favor of Defendant Blyth Eastman Paine Webber, Inc., n/k/a PaineWebber, Inc., on all claims asserted by Plaintiff BankAtlantic, f/k/a Atlantic Federal Savings and Loan Association of Fort Lauderdale in this cause. The Court retains jurisdiction to assess costs and fees and to enforce the July 10, 1989 Order. This case is CLOSED for all administrative purposes.

DONE and ORDERED in Chambers at Miami, Florida on this 24 day of November, 1989.

/s/ Thomas E. Scott
THOMAS E. SCOTT
United States District Judge